No. 15784

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

ELMER ETHRIDGE, *Appellant,*

vs.

UNITED STATES OF AMERICA *Appellee.*

Appeal from a Judgment of the United States District Court for the Eastern District of Washington, Northern Division

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

STATUTE INVOLVED

Appellant was indicted and convicted for a violation of the provisions of the Obstruction of Justice Statute, 18 U.S.C.A., Sec. 1503:

> *"Influencing or injuring officer, juror or witness generally*
>
> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, *or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than*

$5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769." (~~Itaies~~ Italics supplied).

ADDITIONAL STATEMENT OF FACTS

An additional statement of the basic facts of this case will be summarized in order to clarify the questions involved in this appeal.

ADDITIONAL STATEMENT OF CASE

Defendant, Elmer Ethridge, was tried and conviced for a violation of Section 1503 of Title 18, U.S.C.A. He was charged with corruptly endeavoring to impede the due administration of justice. The offense is succinctly set out in the indictment which was returned in this case as follows:

"The Grand Jury charges:

That on or about the 13th day of July, 1956 at Sunnyside, in the Southern Division of the Eastern District of Washington and within the jurisdiction of this court, ELMER ETHRIDGE did corruptly endeavor to impede the due administration of justice; that is to say, on or about the date aforementioned, the said ELMER ETHRIDGE, at Sunnyside, Washington, did agree and promise to Harry C. Walters that for the sum of $1,000.00, he ELMER ETHRIDGE, could and would see that Harry C. Walters could get probation and would not serve one day of his sentence for the conviction of income tax evasion as he, ELMER ETHRIDGE, could and would

use the $1,000.00 to make the necessary arrangements with the proper authorities to see that he, Harry C. Walters, could get probation and would not serve one day of his sentence for the conviction of income tax evasion, the said Harry C. Walters being convicted defendant under Indictment No. C-4514, Southern Division, Eastern District of Washington, and ELMER ETHRIDGE did by these acts, conversations and means corruptly endeavor to impede the due administration of justice, all in violation of Sec. 1503, Title 18, U.S.C.A." (R. 22)

During the year 1956 Harry C. Walters was a Sunnyside, Washington pharmacist. He had been indicted by the Grand Jury of the United States District Court for the Eastern District of Washington on a charge of Federal income tax evasion. Walters was tried on this charge at Yakima, Washington during June, 1956. (R. 30) The jury found Walters guilty of income tax evasion on four counts (R. 31) He was then sentenced by the Court for a term of imprisonment and filed an appeal, which was later dismissed. (R. 31) Mr. Walters posted bail and returned to his home town of Sunnyside, Washington where he continued to work in his pharmacy business. (R. 31) His pharmacy business had been established over a period of some years at Sunnyside, Washington.

On Friday afternoon, July 13, 1956, defendant contacted Walters in Walters' store and had a two-hour conversation with him in the back room of the store.

(R. 32, 33, 36) He informed Walters that he was on an errand to help Walters. He had been sent to Walters by the United States Attorney for the Eastern District of Washington, William B. Bantz, and William Tugman, an Assistant United States Attorney. (R. 34-35) There was a way out for Walters in which Walters would not have to serve a day of his sentence, but it would cost Walters some money. (R. 34) It would cost $1000. (R. 35)

Bantz was the United States Attorney for the Eastern District of Washington. Tugman was his Assistant who participated in the trial of United States v. Walters. (R. 81, 82, 83, 94, 95)

The $1000. would be divided up among the men (Bantz and Tugman) who had put Walters in the predicament that he was in. (R. 36)

Ethridge agreed to guarantee results and if Walters would pay to him the $1000., Walters would never serve a day of his sentence. (R. 36)

Ethridge introduced himself as Wilson and as being from Yakima, Wenatchee and Spokane. (R. 39, 40, 46) He had just returned from the Truman's aides tax trials in St. Louis, Missouri. (R. 140, 143) He discussed in great detail Walters' tax trial and life at the Federal penitentiary.

Walters promised to pay the defendant the $1000. on the next afternoon. No money was ever paid.

Walters then had a customer in his store, Mr. Harry Nimsic, follow Ethridge and take down his automobile license number (R. 71) The license number was traced down to Ethridge. (R 90)

Defendant was identified by Walters (R. 41), Nimsic (R. 74), and Mrs. Walters (R. 65) as the individual conversing with Walters in his back room of July 13, 1956. Walters never saw Ethridge again until the present trial.

In March and April, 1956 at Seattle, Washington the defendant Ethridge participated in a similar transaction with the former Sheriff of King County, Harlan S. Callahan.

Callahan was also a convicted defendant on Federal income tax evasion charges. He had been tried and convicted on three counts of tax evasion and was out on bond, awaiting his sentencing, at Seattle, Washington. (R. 166)

Ethridge contacted Callahan on four occasions and made the same offer as he later did to Walters in July of 1956. This time the amount to be paid was $3,000. (R. 168) All of this sum was to go to a friend of Ethridge, the Assistant United States Attorney

for the Western District of Washington, who had tried Callahan. Callahan would be given a suspended sentence after payment. (R. 168)

Ethridge introduced himself to Callahan as a Mr. White from Wenatchee, Washington. (R. 168)

Callahan indentified Ethridge as the man he knew, named White. (R. 170)

On his last contact with Callahan, Ethridge went to the United States Court House in Seattle, Washington, met Callahan in the corridor outside the court room where Callahan was to be sentenced, and a few minutes before the sentencing offered to set up their deal for $300. (R. 175, 176)

Callahan refused. (R. 176)

Ethridge was surveilled on three of the meetings with Callahan by agents of the Internal Revenue Service and Federal Bureau of Investigation. (R. 156, 167, 158, 160, 161)

Ethridge never approached or contacted any government employee in the Callahan or Walters transactions. Ethridge never attempted to bribe or influence the official actions of any government personage in either of the two tax causes.

Ethridge's actions and contacts were limited to convicted defendants, Callahan and Walters.

ARGUMENT

I

ACTS OF APPELLANT CONSTITUTED AN ENDEAVOR TO IMPEDE THE DUE ADMINISTRATION OF JUSTICE.

The principal issue on this appeal is whether the indictment stated a criminal offense within Title 18, U.S.C.A., Sec. 1503. The Court below answered the question, "yes" on three separate occasions. The majority of the argument is ultimately confined to the sufficiency of the indictment and appellant's attack is directed to its sufficiency respecting the conduct of appellant.

At the outset, appellee states:

1. This case does not involve bribery or attempted bribery of a juror, court official, judge or anyone connected with the office of the United States Attorney.

2. It does not involve any contact or communication, direct or indirect, with any such individual.

3. It does not involve any effort to corrupt any of the enumerated persons or in any manner to affect their deliberations or actions.

We are not at odds with these contentions.

Ethridge contacted a party litigant to a United States Income Tax Evasion trial, after the jury deliberated and its finding of guilt had been returned, but prior to a complete and final determination of the case in respect to the litigant Walters.

This is an attempted shakedown which never succeeded. Ethridge made a direct effort to get $1,000. from Walters. Ethridge sought out Walters and set the proposition up. If payment in cash was made to him, he could arrange it with the officials in the office of the United States Attorney for the Eastern District of Washington so that Walters would never have to serve a day of his sentence. (R. 34, 35, 36) He guaranteed results. (R. 36)

His studied effort to obtain the money was corrupt. Ethridge was trying to perpetrate a fraud on Walters for his own financial advantage. He had no right to seek out Walters and broach any deal which might tend to affect the litigant's further conduct or actions as the case had not been completely determined. The due administration of justice in the cause of United States v. Harry C. Walters in the United States District Court at Yakima, Washington had not been consummated. It was continuing. Walters' appeal was pending. The general public was being solicited to sign a petition on his behalf. (R. 54, 58) Walters was represented by counsel and could, if he had believed appellant, terminated all further judicial

efforts in his own behalf. Ethridge assured him in referring to the petitions:

> "You could have one thousand more and they wouldn't do you any good." (R. 54)

Each and every word, every action, every effort of Ethridge, was an endeavor to impede Walters' future conduct in his tax case. The entire deal, the setup outlined by Ethridge, was that only he could help Walters now. The impression was left that Ethridge had the inside track with the United States Attorney's Office and only he could fix Walters up.

Our lawmaking bodies and our courts have long recognized that it is impossible to properly administer justice if any pressure or attempted pressure is allowed to be brought to bear upon either party to a criminal judicial proceeding. The right to a party to present every bit of evidence legally admissible to the court, at each stage of the proceeding, is a guarantee of justice as perfect as man can make it. The court must be fully informed after a verdict has been reached in order to sift through all of the many involved factors before passing sentence. A litigant similarly may appeal a jury's finding and the court's sentence or present a petition to the court for a lesser sentence, unfettered by the Government or any third party agency. For this reason every conceivable device has been employed to combat any

corrupt effort to influence or to endeavor to influence or impede a party's action in a judicial cause.

The wisdom of the legislative intent behind Section 1503 of Title 18, U.S.C.A. is clearly evident. The Act is a bulwark between honest and impartial American jurisprudence on the one hand, and untruth, intimidation, and coercion on the other hand, which if undeterred by some strong measure, presents another potent foe to our American system of justice. Congress was no doubt fully cognizant of these factors and influences when it enacted Section 1503. They apparently decided that "an ounce of prevention is worth a pound of cure". The courts hear both parties equally and fairly. This Statute is inherently a deterrent enactment to ensure such a hearing.

The accusatory portions of Section 1503, as it relates to this case, reads as follows:

> *". . . or corruptly or by threats of force, or by an threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000. or imprisoned not more than five years, or both."* (Emphasis supplied)

The indictment in this cause conforms in almost identical provision with this provision of Section 1503. In this respect, it complies with Rule 7(c) of

the Federal Rules of Criminal procedure, which states in part:

> "The indictment or the information shall be a plain, concise and definite written statement of the esesential facts constituting the offense charged . . ."

A reading of the indictment with Rule 7(c) in mind answers appellant's question:

> "Was the administration of justice endangered by this act?" (Appellant's Brief, page 18)

The courts have consistently held that the sufficiency of a criminal pleading should be determined by practical, as distinguished from purely technical considerations.[1] A reading of Section 1503 in view of these authorities evidences a regard for a factual indictment based upon a violation of the statute.

The indictment itself clearly sets forth the acts of appellant in a corrupt endeavor to impede the due administration of justice. If Walters had paid the $1000. to Ethridge and in reliance upon Ethridge's guarantee of results, dismissed his attorneys, dismissed his appeal and all further judicial proceedings to which he had recourse, failed to co-operate with

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[1] *Nye v. United States,* 137 F. (2d) 73 (C.A. 4, 1943), cert. den. 320 U.S. 755; *Rosen v. United States,* 161 U.S. 29, 34; *Cochran and Sayre v. United States,* 157 U.S. 286, 290.

the United States Parole Officer, and sat back, it is clear that as to him, full justice would not have been accorded.

Clearly, the administration of justice would have been impeded, actually obstructed, by appellant's acts.

The vice of the present cause is the endeavor to impede, not an actual and successful obstruction, but the endeavor.

The United States Supreme Court has reviewed this Statute, then Section 135 of the Criminal Code of the United States, in considering a similar contention. *United States v. Russell,* 255 U.S. 138 (1921). The indictment charged a corrupt endeavor to influence William D. Russell who was to be called for jury duty as a petit juryman on April 3, 1918. Further, it charged the defendant endeavored to ascertain in advance of the voir doir of the juror in court, whether the juror was favorably inclined towards William D. Haywood and others, whose trial was to be held subsequent to April 3, 1918. Further, defendant did endeavor to convey to the juror an offer to pay money in return for the juror favoring acquittal.

No contact was ever made with the juror. Defendant contacted Lucy Russell, the juror's wife, and questioned her outside the presence of her juror husband and made the offer to her.

Defendant in the *Russell* case stated the solicitation of a third person was only a preparation for an endeavor or attempt to influence the juror in his deliberations, but fell short of an actual endeavor to do so. The Court examined Section 135 and held:

> "Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to 'find out what his (L. C. Russell's) attitude was towards the defendants' to be tried. And that this (we are stating the effect of counsel's contention) was only in preparation of a sinister purpose, that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did not 'want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal.' And this, counsel says, 'only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation,' and 'could be interpreted only . . . to be *preparation* (italics counsel's) for an "endeavor" or "attempt" to influence the juror, but falls far short of an actual endeavor to do so.'
>
> "Counsel enters into quite a discussion, with citation of cases, of the distinction between preparation for an attempt and the attempt itself, and charges that there is a wide difference between them.
>
> "We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based.

> The word of the section is 'endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word 'attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section. Guilt is incurred by the trial—success may aggravate, it is not a condition of it.
>
> "The indictment charges that defendant knew that William D. Russell was a petit juror in the discharge of his duty as such juror and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn."
>
> *United States v. Russell,* 255 U.S. 138, 143 (1921).

Experimental approaches to the corruption of Walters, a direct party litigant, and as such a direct participant in the due administration of his case, as concerns justice, would also be within Section 1503, Title 18, U.S.C.A. Success in the endeavor is merely an aggravation of guilt, not a condition of guilt.

Similar to the Russell case is *Hicks v. United States,* 173 Fd. (2d) 570 (C.A. 4, 1949), cert. den.

337 U.S. 945. This was another case in which a defendant endeavored to influence a juror although he never personally contacted the juror.

These cases appear to disarm appellants of their argument that there can only be a successful prosecution when conduct of a defendant directly operates upon the officer or the Court. (Appellant's Brief, Page 18)

The Supreme Court of the United States has shown in the *Russell* case, 255 U.S. 138, 143 that the statutory provision of using "endeavor" and not "attempt", got rid of any technicalities connected with the word "attempt" and:

> ". . . it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent."
>
> *United States v. Russell*, 255 U.S. 138, 143

This Court, in 1949, recognized the other cases and their reasoning and held that Title 18, U.S.C.A., Sec. 1503, embraces any and all acts of a corrupt nature, the object of which is to impede the due administration of justice. Also, it sets forth the rule followed in the majority of the cases, both State and Federal, that the success of the endeavor is not important; that the Statute is designed to prevent a miscarriage of justice by corrupt methods; and that any corrupt

endeavor to influence, intimidate or impede any party or witness, commissioner, or any grand or petit jury, whether successful or not, constitutes obstruction of justice prohibited by Title 18 U.S.C.A., Sec. 1503.[2] At Page 887 this Court then stated with approval the following:

> "Any corrupt endeavor whatsoever to 'influence, intimidate, or impede any party or witness, * * * commissioner, or any grand or petit juror,' etc., whether successful or not, is proscribed by the obstruction of justice statute. Craig v. United States, supra.
>
> "The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. The concept of 'justice' upon which the foundations of our society rest and which courts and judges are sworn to uphold encompasses not only the right of an accused to a fair trial, but it also calls for punishment if the accused is found guilty. This concept merely recognizes the inherent right of society to protect itself and its innocent members from vicious acts which imperil one of the most vital safeguards of our system of law. It is well to emphasize this wholesome idea as we contemplate the mounting waves of crime.

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[2] *United States v. Russell,* 255 U.S. 138 at page 143; *Roberts v. United States,* 239 Fd. (2d) 467, 470 (C.A. 9, 1956)

> "We agree fully with the statement in Samples v. United States, supra, 121 F. 2d at page 265 that: 'The (obstruction of justice) statute is one of the most important laws ever adopted. It is designed to protect witnesses in Federal courts and also to prevent a miscarriage of Justice by corrupt methods.' Appellant's evil acts clearly and properly fall within the interdiction of the statute."
>
> *Catrino v. United States,* 176 Fd. (2d) 884, 887, (C.A. 9, 1949)

It is the endeavor, not the corruption which is the gist of the offense. *United States v. Russell* 255, U.S. 138.

This is also shown by a case brought before this court, in which the defendants were charged in Count I of an indictment with conspiracy to commit the obstruction of the due administration of justice in a then pending case. This Court held that the indictment did state an offense. It ruled that the acts set out in the indictment in Count I would constitute an obstruction to the administration of justice. The acts consisted of promises by defendants with one McKeon, that for a large sum of money they would bring about corruptly a dismissal of an indictment against McKeon; and that this would be done by means of political influence, gifts of money and things of value to government officials to do acts in violation of their lawful duty and dismiss the charges without regard to the merits thereof. Although the defendants

did carry out the conspiracy, this case is enlightening for its discussion as to the corrupt and wrongful endeavor which would constitute a violation of the then obstruction of justice statute, Title 18, U.S.C.A., Sec. 241, now with minor changes, Title 18, U.S.C.A., Sec. 1503. *Craig v. United States,* 81 Fd. (2d) 816, 820-821 (C.A. 9, 1936), cert. den. 298 U.S. 690.

The reasoning behind these cases shows that Section 1503 was enacted to cope with the known ingenuity of the criminal mind, not by promulgation of a series of set, prohibited acts, but by broad language contained in the latter section of 1503, of proscribed corrupt conduct.

Justice is being administered from the commencement of an investigation to the termination of all aspects of litigation. *Bosselman v. United States,* 239 Fed. 82, (C.A. 2, 1917) involves alleged violations of the identical section involved in this cause. An investigation was pending by the Grand Jury into activities of defendant Bosselman. No criminal case was under way. (A proposal was made to persons, who would not necessarily be witnesses if a trial occurred, to alter certain books and records.) Defendant was convicted of a violation of this section, then 135 of the Criminal Code of the United States.

The Court held that an attempt by one whose conduct was being investigated by the grand jury to

cause his employees to alter entries in his books, was corrupt and was an endeavor to impede and obstruct the due administration of justice. *United States v. Bosselman,* 239 Fed. 82, 86 (C.A. 2, 1917). Another recent and similar case is *United States v. Martin Solow,* 138 F. Supp. 812 (D.C.N.Y., 1956), involving destruction of letters prior to the issuance of a subpoena duces tecum by an investigating grand jury.

These cases point up when due administration of justice commences; that is, when an investigation is underway by a grand jury, but prior to the return of a criminal indictment. There is no necessity of a trial being in progress or contact with the Court or a judicial officer. It is the corruptness, the essay to fetter, the endeavor to balk or impede the workings of justice, which spell out the crime. Clearly, if Ethridge had endeavored to procure the United States Probation Officer to falsify his report to the Court on Walters, even though the trial of Walters was terminated, Section 1503 would apply. Similarly, if the United States Attorney had been approached at that time or the Court contacted by Ethridge, Section 1503 would apply. *United States v. Polakoff,* 121 Fd. (2d) 333, 334 (C.A. 2, 1941), cert. denied 314 U.S. 626. As to the case being on appeal, if Ethridge had contacted the United States Attorney writing the brief in answer to Walters' brief, had one been written, in an endeavor to "take it easy" or fail to file

it, the due administration of justice would have also been obstructed. Lastly, if communication, blackmail, corrupt influence or coercion was brought to bear on the Court of Appeals, prior to or subsequent to hearing Walters' appeal, had it gotten that far, Section 1503 would apply.

Was an endeavor made to impede the due administration of justice, so as to violate Section 1503, Title 18, U.S.C.A.?

The theory and reasoning of the cases cited heretofor and the case of *United States v. McLeod*, 119 Fed. 416 (D.C.ALA., 1902) which denied the applicability of the obstruction of justice statute then in effect, Section 5399 of the Revised Statutes, United States Compiled Statutes, 1901 at Page 3656, answers the question in the affirmative:

> "Justice is administered, in the sense of this statute, only by bringing rights or wrongs, and the persons or things concerned in them, before a judicial tribunal, and there dealing with each particular cases as it arises. Every instrumentality or power, the exercise of which is proper or necessary to the accomplishment of any of these ends, is part and parcel of 'the due administration of justice.' Every unlawful act, specified in the statute, which interferes with or obstructs the normal and proper operation of any of the instrumentalities or powers which the law provides for bringing a matter before a judicial tribunal, deciding it after it is there, and enforcing the judgment rendered, constitutes, as to such

> matter, either an impediment or an obstruction, or an endeavor to obstruct or impede, 'the due administration of justice,' within the meaning of the statute.
>
> ". . . Justice can be obstructed or influenced only by obstructing or impeding those who seek justice in a court, or those who have duties or powers in administering justice 'therein'."
>
> *United States v. McLeod,* 119 Fed. 416, 418 (D.C.ALA., 1902)

There must be a pending proceeding in the Federal courts at the time of the action and in Walters' case, there was very definitely a pending cause, his appeal. Ethridge's shakedown was in relation to a pending proceeding. *United States v. Perlstein,* 126 Fd. (2d) 789, 794 (C.A. 3, 1942), cert. den. 316 U.S. 678.

An exact precedent appears to be lacking but the decisions under the Statute are illuminating in their unwillingness to limit the Court's protection to a litigant from improper obstructions or obstacles in his search for justice.

The Court clearly has the power to adequately protect itself and to enforce their right of self-preservation, as was stated in the *Sinclair* case:

> "We can discover no reason for emasculating the power of courts to protect themselves against this odious thing."

Sinclair v. United States, 279 U.S. 749, 762, 765

In *Sinclair,* the Court was considering the other or contempt section of the original Statute but cited the present section's counterpart as also in point in holding that there was an obstruction of justice in the systematic shadowing of jurors, although unknown to the jurors, and without any approach to any one of them.

Concluding, Ethridge represented himself as working for Bantz and Tugman, of the United States Attorneys office. Actually, he was working for himself. His endeavor to persuade Walters to give him $1000. cash, upon a guarantee that his was the only way out, was an attempted fraud on Walters. To misrepresent his motives in such an effort was really a fraud, spelling out in singular detail his intent, his motives of corruptness. The ultimate criminal act was when the false persuasion was committed on a party litigant to a then pending Federal proceeding.

United States v. Polakoff, 121 Fd. (2d) 333, 335 (C.A. 2, 1941), cert. den. 314 U.S. 626.

This is another practice which this Statute was designed to prohibit, a prevention of a miscarriage of justice by corrupt methods as has been aptly stated in *Samples v. United States,* 121 Fd. (2d) 263, 266 (C.A. 5, 1941), cert. den. 314 U.S. 662:

"The statute is broad enough to cover any act, committed corruptly, in an endeavor to impede or obstruct the due administration of justice."

II

NO ERROR IN ADMITTING THE TESTIMONY OF MCCARTHY, KEIL, CALLAHAN AND DION

(a) The admission of the testimony of Callahan was proper. It had a clear bearing on Ethridge's later deal with Walters as to appellant's motive and intent, and showed that the Walters occurrence was not a mistake, or a chance meeting, but part of a common scheme or plan in which Ethridge made his living.

The evidence was not offered to show identity. (R. 124)

An essential element of this offense was the corrupt actions of Ethridge and the intent with which he acted. He was charged with corruptly endeavoring. It had to be shown that he tried to perform this act and did some overt act which tended but fell short of accomplishing it with the intent to accomplish it.

Intent then, was an essential element to be proven in this case. The quoted rule as set forth in *Van Gesner v. United States,* 153 Fed. 46, 55, 56 (C.A. 9, 1907) applies with equal force to the facts of this cause. Quoting *Wood v. United States,* 16 Pet. 341, 10 L.Ed. 987:

> 'Where the intent of the party is matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.'

(b) The evidence was also admissible in showing a unique plan or scheme which is somewhat elaborate and has special distinguishing characteristics and details, much like an individuals signature to a letter. It is different and noteworthy and reflects his mode of operation by a showing of other similar transactions. *Parsons v. United States,* 189 Fd. (2d) 252, 254 (C.A. 5, 1951); *State v. Sedam,* 46 Wn. (2d) 725, 284 P. (2d) 292; *State v. Lew,* 26 Wn. (2d) 394, 174 P. (2d) 291; *State v. Edelstein,* 146 Wash. 221, 237, 238; 262 Pac. 622.

This evidence came within one of the well recognized exceptions to the general rule excluding evidence of other crimes which has been stated as follows:

> "Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the defendant's guilt of the crime charged. *Subsequent* as well as prior collateral offenses can be put in evidence, and from such system, identity or *intent* can often be shown . . . The time of the collateral

> facts is immaterial, provided they are close enough together to indicate that they are a part of the system." (Italics ours.) 1 Wharton's Criminal Evidence (11th ed.) 527, Sec. 352."

The following statement is made in 4 Nichols Applied Evidence 3424, Sec. 2:

> "Evidence tending to show the commission of another crime is admissible in a proper case, but the exceptions to the general rule 'are carefully limited and guarded by the courts, and their number should not be increased.' Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish: . . . (2) intent; . . . (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other."

Hall v. United States, 235 Fed. 869, 870 (C.A. 9, 1916) sums up the rule in this regard:

> "The intent and disposition with which one does a particular act must be ascertained from his acts and declarations before and at the time; and when a previous act indicates an existing purpose, from which known rules of human conduct may fairly be presumed to continue and control the defendant in the doing of the act in question, it is admissible in evidence. In many cases it is the only way in which criminal intent can be proved; and the evidence is not to be rejected because it might also prove another crime against the defendant. The practical limit to its admission is that it must be sufficiently significant in character, and sufficiently near in point of time, to afford a presumption that the element sought

to be established existed at the time of the commission of the offense charged. The limit is largely in the discretion of the judge."

(c) The exception to the rule, excluding evidence of other crimes, was adopted for the Federal courts in *Wood v. U. S.* 16 Pet. 341, 359, 360; 10 L.Ed. 987. The rule admitting evidence that an accused had participated in another similar transaction has bearing upon his motive or intent has been repeatedly approved in the federal courts. The case of *United States v. Wall,* 225 Fd. (2d), 905, 907, (C.A. 7, 1955), cert. den. 350 U.S. 935, is directly in point. In that case the defendant promised to use his influence to procure a promotion for a postal employee. The promotions were customarily based on the payment of money to him, and he had an established *plan* in doing business in the selling of his influence. Evidence of other alleged promises and payments of money from other postal employees, to procure promotions, were admitted during the trial and the Circuit Court approved the admission of the evidence on the grounds that it showed his plan of doing business in the selling of his influence. (Italics supplied)

A similarity of the manner in which other complete offenses were committed, being in remarkable conformity to the pattern of other distinct and separate transactions which were involved in a conspiracy charged against the defendant, made all of this type

of evidence admissible. As to the other conspiracy count, the other offenses were corroborative of similar offenses received to prove the conspiracy count, because the *pattern* of those transactions bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. We recognize the rule which usually is applicable in a conspiracy case as to allow proof of these other types of offenses. In any event, however, the testimony in this case showed Ethridge's known *pattern* and *similar plan* of business in representing himself as an expert in bribing and using his influence with Assistant United States Attorneys. ***United States** v. Iacullo,* 226 Fd. (2d) 788, 793 (C.A. 7, 1955). (Italics supplied)

In Walters transaction and in the Callahan occurrence the plan, the pattern and the unique individuality of the scheme is apparent.

Walters Case (July 13, 1956)

1. A convicted Federal tax evader.

2. Walters was sentenced, but out on bond, awaiting an appeal.

3. Ethridge sought out Walters, going under the name of Wilson.

4. He was from Yakima, Wenatchee and Spokane, Washington.

5. He was acting for the men in the office of the United States Attorney, Eastern District of Washington, who had tried and convicted Walters.

6. He talked knowingly of other tax cases.

7. For $1000. cash Ethridge could guarantee that Walters would never serve one day of his sentence.

8. The money would go to the United States Attorneys Office, inferring the United States Attorneys, as friends of Ethridge, could be bribed. The bribe would affect their public duties in Walters' behalf.

9. He was there to help Walters (R. 34)

Callahan—Seattle, Washington, March-April, 1956

1. A convicted Federal tax evader.

2. Callahan was out on bond, awaiting his sentence.

3. Ethridge sought out Callahan, giving his name as White.

4. He was from Wenatchee, Washington.

5. He was acting for the Assistant United States Attorney, Western District of Washington, John Obenour, who had tried Callahan in his tax case.

6. He talked knowingly of other tax cases.

7. For $3,000 cash, Ethridge could see that Callahan would get a suspended sentence.

8. The money would go to Obenour. This Assistant United State Attorney could help Callahan get a suspended sentence. The bribe would affect Obenour's public duty in Callahan's behalf.

9. No one else could help Callahan. (R. 167)

The scheme, the siren song of the glib confidence man in both shakedown efforts is remarkably similar and clearly showed his common scheme, plan and mode of operation.

This type of evidence is admissible as an exception to the general rule of exclusion[3], and was properly admitted.

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[3] *United States v. Wall,* 225 Fd. (2d) 905, 907 (C.A. 7, 1955), cert. den. 350 U.S. 935; *Lindsey v. United States,* 227 Fd. (2d) 113, 117, (C.A. 5, 1955), cert. den. 350 U.S. 1008; *King v. United States,* 144 Fd. (2d) 729, 732 (C.A. 8, 1944), cert. den. 324 U.S. 854; *Weis v. United States,* 122 Fd. (2d) 675, 682 (C.A. 5, 1941); *Neff v. United States,* 105 Fd. (2d) 688, 691 (C.A. 8, 1939); *Grant v. United States,* 268 Fed. 443, 448 (C.A. 6, 1920), cert. den. 256 U.S. 700.

III

NO ERROR COMMITTED BY THE COURT IN GIVING INSTRUCTION NO. 15 AND IN DENYING DEFENDANT'S INSTRUCTIONS.

(a) The trial court fully discharged its duties in protecting appellant's rights. Instruction No. 15 was proper. (R. 320) It was based upon the evidence in this cause and appropriately delimited the effect of the testimony as far as jury considerations were concerned. The court restricted the use of this testimony to the question of intent and whether or not there existed a scheme, plan, system or design. *Lindsey v. United States,* 227 Fd. (2d) 113, 117, 118 (C.A. 5, 1955), cert. denied 350 U.S. 1008.

The record is bare of any alternate request by appellant or a request by him to amplify this charge. In this respect, appellant failed to comply with the requirement of Rule 30, Federal Rules of Criminal Procedure.

IV

COURT DID NOT ERR IN ADMITTING TESTIMONY BY WALTERS CONCERNING APPELLANT'S PRESENCE AT THE LAMAR CAUDLE TRIAL. (Statement of Appellant's Points No. 3)

Appellant has apparently withdrawn his specification of error No. 3. In any event, the boasting by Ethridge to Walters of his experience in fixing

United States Attorneys and his other deals (to Callahan and Walters) was admissible as a part of his overall scheme in each occurrence.[4] *Miller v. United States,* 47 Fd. (2d) 120 sums up the applicable rule.

> "In the course of the conversations, during all of this time, he referred to his own connection with other criminal activities. These references are inextricably interwoven with his suggestions to Jack and with his admissions to Jack of his connection with others among the conspirators. The conversations, taken as a whole, were evidence relevant to the proof of the charge. Evidence which is relevant is not rendered inadmissible because it proves, or tends to prove, another distinct offense."

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[4] *Parsons v. United States,* 189 F. (2d) 252, 254 (C.A. 5, 1951).

CONCLUSION

This case presented a factual situation which our Congress must have envisioned when they enacted Section 1503, Title 18, U.S.C.A.

For the reasons set out herein, it is submitted that the Judgment of the United States District Court should be affirmed.

Respectfully submitted,

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